Supreme Court, U.S.
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In The
Supreme Court of the United States

GARY L. BROBSTON,
Petitioner,

v.

INSULATION CORPORATION OF AMERICA,
Respondent.

Petition For a Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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53 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the trial court emasculated ADEA by holding that direct evident of age discrimination -- "I can hire a couple of young bucks for what I am paying you" -- is not sufficient to take case to jury?

2. Whether or not the District Court erred as a matter of law by resolving question of fact about the identity of the employees who replaced Petitioner in favor of Respondent when Respondent failed to disclose the relevant documents?

3. Whether or not the District Court erred as a matter of law in granting Respondent's Motion for Summary Judgment because the United States Magistrate Judge found that **"the weight of the evidence indicates that Brobston's job performance was not satisfactory"?**

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No. _____

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

The Petitioner, Gary L. Brobston, prays that a Writ of Certiorari issue to review judgment of the U.S. Court of Appeals, Third Circuit.

OPINIONS BELOW

The Order of the U.S. Court of Appeals, Third Circuit, rendered on December 18, 1995 is unrecorded and appears at page 1a of the Appendix herein.

The Order of the United States District Court for the Eastern District of Pennsylvania rendered on May 23, 1994 is unrecorded and appears at page 3a of the Appendix herein.

The final Order of the Court of Appeals for the Third Circuit was dated December 18, 1995 and this Petition for Certiorari is timely filed within ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. § 1254(1) and Rule 17 of this Honorable Court.

FEDERAL PROVISION INVOLVED

29 U.S.C § § 621-638 at Appendix 31a.

STATEMENT OF THE CASE

Petitioner filed this action seeking damages arising from Respondent's allegedly illegal termination of Petitioner in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*

The United States District Court granted Respondent's Motion for Summary Judgment on April 5, 1994. Whereupon, Petitioner filed a Motion to Reconsider that Order, which was denied on May 23, 1995. On December 18, 1995, The Third Circuit of U.S. Court of Appeals affirmed. Petitioner now respectfully seeks review by this Honorable Court.

REASON RELIED UPON FOR ALLOWANCE OF THE WRIT

The Court of Appeals for the

Third Circuit has rendered an Order which sanctions a decision by the United States District Court for the Eastern District of Pennsylvania which is so far departed from the accepted and usual course of judicial proceedings that an exercise of the Supreme Court's power of supervision is appropriate. Specifically, the District Court unilaterally discounted Petitioner's proffered direct evidence of age discrimination because it was "self-serving," and made plain errors about the first time such evidence appeared in the record. The District Court failed to view direct evidence of age discrimination, as well as evidence of pretext, in the light most favorable to the non-movant at the Summary Judgment stage, and made its own credibility determinations. In

fact, the District Court admittedly "weighed" evidence at the Summary Judgment stage.

Particularly in a situation where the Court of Appeals for the Third Circuit affirmed the District Court without opinion, and where the District Court is apparently at odds with prior decisions of the Third Circuit, Petitioner prays that this Honorable Court will exercise its powers of review to redress the apparently egregious errors made by the United States Magistrate Judge in the District Court.

STATEMENT OF THE FACTS

Petitioner was continuously employed by Respondent from October, 1982 until August 13, 1993, at which time he was terminated.

Petitioner filed a claim of Age

Discrimination with the EEOC on September 17, 1993. Petitioner then filed a complaint in the United States District Court for the Eastern District of Pennsylvania on or about May 29, 1994, alleging that he was terminated due to his age in violation of the ADEA. Shortly thereafter, EEOC investigator Mr. Stanford Lamb wrote directly to Petitioner, asking him for additional information which could be placed on the EEOC record. In response to this request, Petitioner himself, acting without the assistance of counsel, wrote a supplemental letter to Mr. Lamb, dated June 20, 1994, in which he alleged that he was terminated because, for his salary, Respondent said it could afford to hire "a couple of young bucks." Because a charge had been filed in the

District Court, the EEOC discontinued its investigation pursuant to normal policy on August 9, 1994.

Respondent's filed a Motion for Summary Judgment in the District Court, which was granted on April 5, 1995. The District Court denied Petitioner's subsequent Motion to Reconsider on May 23, 1995.

ARGUMENT

1. WHETHER OR NOT THE TRIAL COURT EMASCULATED ADEA BY HOLDING THAT DIRECT EVIDENT OF AGE DISCRIMINATION -- "I CAN HIRE A COUPLE OF YOUNG BUCKS FOR WHAT I AM PAYING YOU" -- IS NOT SUFFICIENT TO TAKE CASE TO JURY?

A. Petitioner's direct evidence of age discrimination was improperly discounted because the District Court found it to be "self-serving." In his

opinion, the United States Magistrate Judge discounted Petitioner's "self-serving" claim that he was told by Tom Higgins, Chairman of the Board for Respondent, that for Petitioner's salary, he could afford to hire "a couple of young bucks." The Magistrate Judge relied upon Healy v. New York Life Ins. Co., 860 F.2d 1209, 1215 (3d Cir. 1988), which is curious because the Third Circuit held there that while "self-helpful" statements, "may be to some degree suspect," a post hoc statement does not in and of itself make the statement untrustworthy. Id. In fact, in affirming the granting of Summary Judgment for the Defendant, there, the Third Circuit specifically found that Summary Judgment was appropriate because the plaintiff had produced no

counter-affidavits or argumentation, which Petitioner in this case has clearly done. Id. In fact, the Third Circuit has defined direct evidence of age discrimination as, "evidence which, *if believed*, would prove the existence [of the fact] without inference or presumption." Torre v. Casio, Inc., 42 F.3d 825, 829 (3d Cir. 1994) (emphasis added). Therefore, the Magistrate Judge's decision is not in accord with Third Circuit authority, and reflects judicial weighing that is clearly improper at the Summary Judgment stage.

B. The Magistrate Judge ignored the EEOC record when determining that Petitioner's direct evidence was not offered until after Respondent filed its Motion for Summary Judgment. In making his credibility determination,

the United States Magistrate Judge found that Petitioner did not allege that he was told by Respondent that, **"I could hire a couple of young bucks for what I'm paying you"** until after Respondent filed its Motion for Summary Judgment. Assuming *arguendo* that such a credibility determination is appropriate at the Summary Judgment stage, the Magistrate Judge's finding is clearly contradicted by the EEOC record. Petitioner wrote a letter to EEOC investigator Stanford Lamb on June 20, 1994 alleging that he was told he was being terminated because Respondent "can hire a couple young bucks" for Petitioner's salary. This letter was written **more than six months** before Respondent filed its Motion for Summary Judgment. Although Respondent denied making this remark

about hiring "young bucks," at the very least, Petitioner presented a genuine issue of material fact which would preclude summary judgment.

C. Telling an employee that he is being fired because the employer "can afford to hire a couple of young bucks for what I'm paying you" is direct evidence of age discrimination. This Honorable Court has held that an employer's policy which provides disparate treatment for older employees can count as direct evidence of age discrimination. Trans World Airlines v. Thurston, 469 U.S. 111 (1985). However, the Third Circuit has not read this requirement to preclude other types of evidence from counting as direct evidence. In a gender discrimination case, a police chief's statement to a female

applicant that, "[the township commissioner] wants a man for the job" as an excuse for passing her over was direct evidence of gender discrimination. Wilson v. Susquehanna Twp. Police Dept., 55 F.3d 126, 128 (3d Cir. 1995). In the case at bar, Petitioner was told that he was being fired because Respondent would rather hire "a couple young bucks" for the same salary. Such a statement requires no inference or presumption to conclude that Petitioner was fired because Respondent would prefer to have "young bucks" working for it, instead of the 49 year old Petitioner, who is no longer a "young buck." Respondent's statement is clearly direct evidence that Respondent was firing Petitioner due to Petitioner's age, which precludes Summary Judgment.

2. WHETHER OR NOT THE DISTRICT COURT ERRED AS A MATTER OF LAW BY RESOLVING A QUESTION OF FACT ABOUT THE IDENTITY OF EMPLOYEES WHO REPLACED PETITIONER IN FAVOR OF RESPONDENT WHEN RESPONDENT FAILED TO DISCLOSE THE RELEVANT DOCUMENTS?

A. The District Court relied solely upon one witness's deposition to conclude that Petitioner was not replaced by a younger worker, and ignored other deponents' testimony to the contrary. The Magistrate Judge indicated that Petitioner failed to establish a *prima facie* case of age discrimination because of **hearsay** claims Michael Marsh, a 54 year old employee, assumed roughly 80% to 90% of Petitioner's duties after Petitioner was terminated.

Thereafter, the Magistrate recognizes that two other employee's who are outside of the protected age class also testified that part of Petitioner's duties went to them after Petitioner was fired. However, the Magistrate Judge **ignored** these conflicting accounts, and summarily concluded that Petitioner has not met his burden to establish that he was replaced by a younger person or persons. At the very least, the testimony of these deponents -- and the hearsay basis concerning Marsh's job function -- produces a genuine issue of material fact which would make Summary Judgment inappropriate.

B. The District Court failed to hold an *in camera* hearing which would conclusively establish who took over Petitioner's sales accounts, and chose

instead to believe the testimony of one of Respondent's witnesses. The nature of Petitioner's salesman job was that he, and only he, sold Respondent's products with a certain specified code number. On Monthly Product Summary sheets submitted by every salesman, the code numbers indicate who is selling which product. If these Monthly Product Summaries are examined, one can easily see who assumed Petitioner's job responsibilities. At a conference on February 28, 1995, the District Court indicated that after looking at Respondent's Motion for Summary Judgment, the District Court would decide whether or not an *in camera* hearing should be held, where those Monthly Product Summaries could be confidentially examined. However, the

District Court never held that *in camera* hearing, and the Monthly Product Summaries have never been examined by Petitioner or by the District Court. Nevertheless, the District Court has resolved a genuine issue of material fact, i.e. who replaced Petitioner, in favor of the Respondent, which is improper at the Summary Judgment stage.

3. **WHETHER OR NOT THE DISTRICT COURT ERRED AS A MATTER OF LAW IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE UNITED STATES MAGISTRATE JUDGE FOUND THAT "THE WEIGHT OF THE EVIDENCE" INDICATES THAT BROBSTON'S JOB PERFORMANCE WAS NOT SATISFACTORY"?**

The District Court admittedly engaged in "weighing" evidence at the Summary Judgment stage to find that

Petitioner offered no evidence of pretext. Respondent's alleged legitimate business reason for terminating Petitioner was inadequate job performance. Respondent admitted that when Petitioner was fired, Petitioner had increased sales volume in his territory by more than 20%. The Respondent also alleged that Petitioner failed to make 3 overnight stays per week, in violation of company policy. Petitioner offered credit card receipts as evidence to show that out of three salespeople, there was only one week in all of 1993 when a salesman made 3 overnight stays per week. Again, the Magistrate Judge ignored Petitioner's evidence, and specifically held that "the weight of the evidence indicates that Brobston (sic) performance was not satisfactory

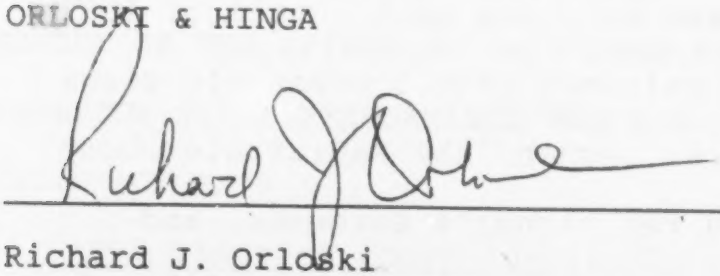
because of his failure to adhere to company policy." 29a A genuine issue of material fact clearly exists as to Respondent's proffered legitimate business reasons for firing Petitioner or else the District Court would not have had to "weigh" conflicting evidence in granting Summary Judgment for the Respondent.

CONCLUSION

For the foregoing reason, this Petition for Writ of Certiorari ought to be granted.

Respectfully submitted,

ORLOSKI & HINGA



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-1491

GARY L. BROBSTON,

Appellant

v.

INSULATION CORPORATION OF AMERICA

Appeal of the United States District Court for the Eastern District of Pennsylvania D.C. Civil Action No. 94-cv-3315
(District Magistrate Judge: Honorable Arnold C. Rapoport)

Argued: December 12, 1995

Before: BECKER, ROTH and LEWIS, Circuit Judges.

JUDGEMENT ORDER

After consideration of all contentions raised by appellant, it is ADJUDGED AND ORDERED that the orders of the district court of April 5, 1995 and May 25, 1995 be and are

hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT:

/s/ Becker
Circuit Judge

Attest:

/s/ P.Douglas Sisk
P. Douglas Sisk, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

GARY L. BROBSTON,	:	CIVIL ACTION
	:	
Plaintiff	:	No. 94-3315
	:	
vs.	:	
	:	
INSULATION CORPORATION OF AMERICA,	:	JURY TRIAL DEMANDED
	:	
Defendant		

ORDER

AND NOW, THIS 23 day of May, 1995 upon consideration of the Plaintiff's Motion to Reconsider Order of April 5, 1995 and Defendant's Reply thereto,

It is hereby ORDERED AND DECREED that Plaintiff's said Motion is DENIED.

BY THE COURT:

/s/ Arnold C. Rapoport
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

GARY L. BROBSTON	:	CIVIL ACTION
	:	
v.	:	
	:	
INSULATION CORPORATION OF AMERICA	:	No. 94-33315

MEMORANDUM

ARNOLD C. RAPOPORT JUNE 30TH, 1995
UNITED STATES MAGISTRATE JUDGE

Plaintiff Gary L. Brobston ("Brobston") brought this action against defendant Insulation Corporation of America ("ICA") alleging that he was unlawfully terminated due to his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § § 621-634. ICA moved for summary judgement on the ground that Brobston failed to establish a *prima facie* case of age discrimination, and, in the alternative, that ICA had demonstrated

legitimate business reasons for Brobston's termination which he had failed to demonstrate were pretextual. This Court granted Defendant's Motion for Summary Judgement on April 5, 1995. Plaintiff filed a Motion to Reconsider the order granting Defendant's Motion for Summary Judgment, which was denied by this Court on May 23, 1995. The reasons for my granting of ICA's motion for summary judgment and subsequent denial of Brobston's motion to reconsider are stated below.

I. Factual Background

On August 13, 1993, Gary Brobston, who at the time was forty-seven years of age, was terminated from his employment at ICA. (Brobston N.T. at 19). Shortly thereafter, ICA sought a Preliminary Injunction

against Brobston in the Lehigh County Court of Common Pleas alleging that he violated the covenant not to compete contained in his employment contract with ICA. On December 17, 1993, a temporary order was granted pursuant to ICA's petition for the preliminary injunction. (Def.'s Mot. S.J. Ex. 3). A hearing in regard to the preliminary injunction was held on December 23, 1993, and a preliminary injunction enjoining plaintiff Brobston from disclosing confidential business information and from competing with ICA customers was granted on December 30, 1993. (Def.'s Mot. S.J. Ex.'s 4, F). On or about May 29, 1994, Brobston filed a complaint in this Court alleging that he was terminated on the basis of age in violation of the ADEA.

Brobston began working for ICA in 1982 as a territorial sales manager. In 1985 he was promoted to national account sales manager. In 1990 Brobston was promoted to general manager of ICA. In July 1990 he entered into a written employment contract with ICA that included the restrictive covenant which was the subject of ICA's prior action. (See Def.'s Mot. S.J. Ex. A, ¶ 5). In November 1992, Brobston's job position changed to Vice President of Special Products. His new responsibilities included the following: 1) the development of new customers in Territory 60, which involved the sale of specialty products using a CAD computer system; and 2) the assumption of the job duties of a retiring employee, which involved the sale of

commodity products in Territory 80. (Pl.'s Brief Opp. S.J. at 2).

ICA contends that Brobston was terminated in August 1993 because of his inadequate performance in his position as Vice President of Specialty Sales. Among the reasons for dismissal, ICA cites Brobston's failure to turn in weekly expense accounts, an inadequate amount of time spent on the road visiting customers, his failure to follow management's instructions to increase the amount of time spent visiting customers, and an overall inadequate amount of sales. (See generally Def.'s Mot. S.J. Ex.'s 4, 7, 8).

Brobston argues that he was terminated due to his age. He alleges that management told him that they could no longer afford him and that

the were going to replace him with "a couple of young bucks," which he contends ultimately occurred. He also contends that his job performance was adequate. (See generally Brobston Aff.).

II. Legal Standard

Entry of summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c). Thus, if there is no genuine issue of material fact, "the moving party is entitled to a judgment as a matter of law." Id. A genuine issue of material fact exists "if the evidence is such that a

reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the initial burden of identifying for the Court those portions of the record that demonstrate no genuine issue as to material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has satisfied this requirement, the burden shifts to the nonmoving party to present evidence on the record that there is a genuine issue of fact. Id. at 324; Fed.R.Civ.P. 56(e). Additionally, all inferences must be drawn, and all doubts resolved, in favor of the nonmoving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Gans v. Mundy, 762 F.2d 338, 340 (3d. Cir.), cert. denied, 474

U.S. 1010 (1985).

III. Discussion

In an age discrimination claim, a plaintiff must first establish a *prima facie* case of discrimination. The Third Circuit has held that, in the absense of direct evidence, the four elements a plaintiff is required to show to establish a *prima facie* case of age discrimination claim are that the plaintiff: 1) is at least forty years of age; 2) was qualified for the position; 3) was terminated despite being qualified; and 4) was ultimately replaced by a sufficiently younger person such that an inference of age discrimination is raised. Gray v. York Newspapers, Inc., 957 F.2d 1070, 1078 (3d Cir. 1992) (citing Billet v. Cigna Corp., 940 F.2d 812, 816 n. 3

(3d. Cir. 1991)).

An inference of unlawful discrimination is created if the plaintiff succeeds in establishing a *prima facie* case. Gray, 957 F.2d at 1078. The burden then shifts to the defendant to dispel the inference by articulating legitimate, nondiscriminatory business reasons for the plaintiff's dismissal. Id. If this burden is met by the defendant, the plaintiff then is required to demonstrate by a preponderance of the evidence that the articulated reasons are a pretext for the discrimination. Id.; Billet, 940 F.2d at 816. However, at all times the plaintiff has the burden of proving that age was the determinative factor in the defendant's decision to terminate the plaintiff. Gray, 957 F.2d at 1078;

see also Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3d Cir. 1987) (stating that plaintiff "must prove age made a difference in the decision").

A. Plaintiff has failed to establish a *prima facie* case of age discrimination

Here, plaintiff Brobston has offered no direct evidence of age discrimination. Also, Brobston had failed to establish a *prima facie* case of age discrimination because he has not established all four factors articulated in Gray v. York Newspaper, Inc. in that he has not demonstrated that he was replaced by a sufficiently younger person.

Brobston first argues that direct evidence exists to support his age discrimination claim. However, the only evidence he offers is a self-

serving statement, included in his March 1994 affidavit, that he was told by Tom Higgins, Chairman of the Board of ICA, that he was being terminated because "I can hire a couple of young bucks for what I am paying you." (Brobston Aff. ¶ 22). Such assertions must be viewed cautiously because "any self-helpful statement made after the initiation of a lawsuit...may be to some degree suspect." Healy v. New York Life Ins. Co., 860 F.2d 1209, 1215 (3d Cir. 1988). Furthermore, this statement is clearly inconsistent with Brobston's prior sworn testimony. At his deposition on February 10, 1995, Brobston testified as follows:

Q. Did anyone at ICA ever tell you directly that the reason for your termination was because of how old you were?

A. No.

Q. Did you ever read any documentation that indicated directly that the reasons for your termination was because how old you were?

A. I didn't read anything, no. (Brobston Dep. at 88). Thus Mr. Brobston's affidavit allegations directly contradict his prior sworn deposition testimony.[1] Furthermore, Mr. Higgins strongly denies that he ever verbalized to plaintiff that "I can hire a couple of young bucks for what I am paying you," (Higgins Aff.

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1. It is also notable that Brobston's affidavit is dated March 4, 1995, which is three days after Defendant's Motion for Summary Judgment was served on plaintiff's attorney. A review of the record prior to the date of Brobston's affidavit reveals that nowhere in his prior testimony did he ever make reference to the alleged statements by Mr. Higgins. (See Brobston N.T., Brobston Dep.).

of Apr. 3, 1995, ¶ 3), and Mr. Dean, President of ICA and who was also present at the time of this alleged statement, also denies that it was ever made. (Dean Aff. of April 3, 1995, ¶ 11). Therefore, Brobston's allegation is insufficient to constitute direct evidence of age discrimination.

Brobston has also failed to establish a *prima facie* case of age discrimination because the preponderance of the evidence does not demonstrate that he was ultimately replaced by a younger person. Michael Marsh, manager of commodity sales at ICA and who at fifty-four years of age at the time of Brobston's termination was roughly seven years older than Brobston, indicated that he assumed approximately eighty to ninety percent

of the sales route that was formerly part of Brobston's duties. (Marsh N.T. at 197; Marsh Aff. ¶ 5). Joyce Tshudy (formerly Tarsovich), a former salesperson at ICA, testified that upon Brobston's termination his responsibilities were divided among herself, Michael Marsh, and Alan Colorito, with the majority of the accounts going to Marsh. (Tshudy Dep. at 35). Alan Colorito, also indicated that Brobston's responsibilities were divided between himself, Joyce Tshudy, and Michael Marsh. Although he did not know exactly how they were divided, he stated that he received only one of Brobston's accounts. (Colorito Dep. at 33-34).

Brobston argues that the evidence indicates that his responsibilities were assumed by Alan Colorito, then

twenty-five, and David Boston, then thirty-two, the alleged "young bucks." The record indicates, however, that Alan Colorito began working at ICA in March 1993, five months before Brobston was terminated, and that he only undertook one of Brobston's accounts. (Colorito Dep. at 7, 33-34). Furthermore, the evidence establishes that David Boston was hired in February 1994 to replace Joyce Tshudy, who left ICA voluntarily at that time. (Boston Dep. at 6, 21; Tshudy Dep. at 30; Colorito Dep. at 41-42). Therefore, Brobston has failed to demonstrate any evidence that he was replaced by a sufficiently younger person.

Brobston has failed to establish age discrimination though the use of direct evidence. He has also failed

to establish a *prima facie* case under the four elements articulated in Gray v. York Newspaper, Inc. because he has not demonstrated that he was replaced by a sufficiently younger person. Thus summary judgement is appropriate in this case.

B. ICA has proffered legitimate business reasons for Brobston's termination and Brobston has not offered any evidence that ICA's reasons are a pretext

Assuming, *arguendo*, that Brobston has established a *prima facie* case of age discrimination, summary judgement is still appropriate because ICA has articulated legitimate business reasons for dismissing Brobston, and he has not presented reasonably sufficient evidence that ICA's articulated reasons are a pretext for discrimination. E.g., Perry v. Prudential-Bache Securities, Inc., 738

F.Supp. 843, 852 (D.N.J. 1989), aff'd 904 F.2d 696 (3d. Cir. 1990). Thus there is no evidence to establish that age was the determinative factor in the dismissal Brobston.

Once a *prima facie* case has been established by the employee, the burden shifts to the employer to offer legitimate business reasons for the employee's termination. Gray, 957 F.2d at 1078. The Third Circuit has pronounced this burden to be "relatively light." Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). Furthermore, the employer does not need to prove that the offered reasons were what actually motivated its behavior because the ultimate burden of proving discrimination is always on the employee. Id. (citing Texas Dep't of Community Affairs v.

Burdine, 450 U.S. 248. 253-256 (19981)). In this case ICA has offered sufficient grounds for dismissal to carry its burden.

In November 1992, Brobston's job position changed, and his new responsibilities included the following: 1) the development of new customers in Territory 60, which involved the sale of specialty products using a CAD computer system; and 2) the assumption of the job duties of a retiring employee, which involved the sale of commodity products in Territory 80. (Pl.'s Brief Opp. S.J. at 2).

Defendant ICA has presented a number of business reasons why Brobston was terminated. ICA indicated that while Brobston was in his new position from November 1992

until August 1993, the sales in Territory 60 were negligible, a fact to which Brobston concedes. (Brobston N.T. at 45; Dean Aff. of Feb. 27, 1993, ¶ 13; Higgins Aff. of Mar. 2, 1993, ¶ 6; Def.'s Mot. S.J. Ex 15).

As part of his responsibilities, Brobston was required to be on the road visiting his customers and had to submit weekly expense reports. (Dean N.T. at 158-61; See Def.'s Mot. S.J. Ex. 2.) ICA asserts that Brobston's performance was deficient because he only submitted thirteen expense reports in the thirty-two week period from January 1993 through mid-August 1993. (Dean N.T. at 158-61).

ICA further contends that Brobston was not adequately performing his duties in that he was not sufficiently contacting his customers.

(Dean N.T. at 157-60; Higgins Aff. of Mar. 2, 1993, ¶¶ 4-9). ICA argues that Brobston failed to adhere to the company policy of sales representative spending approximately three overnight stays per week for the purpose of sales calls. Id. In the aforementioned thirty-two week period, Brobston made only thirteen overnight visits out of a possible ninety-six if he had been following company policy. Id. Mr. Dean, President of ICA, informed Brobston that his performance was not satisfactory four times from January 1993 though August 1993, and Brobston had also been warned that he was not to come into the Allentown plant, except on Fridays, from January 1993 though August 1993 because he was supposed to be visiting customers. (Brobston N.T. at 42; Dean N.T. at

158-61). Finally, due to his concern about Brobston's performance, Mr. Dean accompanied him on a trip in the beginning of August 1993 in an effort to determine how often Brobston was contracting customers. After this trip, Mr. Dean was of the opinion that Brobston had not been contacting clients in an acceptable manner. (Dean N.T. at 161-62). Furthermore, Brobston himself indicated that he was aware Mr. Higgins, Chairman of the Board of ICA, was unhappy with his performance. (Def.'s Mot. S.J. Ex. 16).

Therefore, the evidence establishes that ICA has met its burden in articulating legitimate business reasons for Brobston's dismissal. Once the employer meets its burden, the employee "must prove by a preponderance of the evidence

that the articulated reasons are a pretext for [age] discrimination." Gray, 957 F.2d at 1078; Billet v. Cigna Corp, 940 F.2d 812, 816 (3d Cir. 1991). The plaintiff employee can meet this burden "either 'directly by persuading the court that a discriminatory reason more likely [than not] motivated the employer or indirectly by showing the employers's proffered explanation is unworthy of credence.'" Gray, 957 F.2d at 1078 (quoting Billet, 940 F.2d at 816).

Brobston argues that, although he was required to be on the road as part of his job responsibilities, he was unaware of any company policy requiring sales representatives to make three overnight stays per week. (Brobston N.T. at 36-37). However, Joyce Tshudy, David Boston, and Mike

Marsh, sales representatives, all indicated that they were instructed to make three overnight stays per week as part of their job responsibilities. (Tshudy Dep. at 33; Boston Dep. at 22; Marsh Aff. ¶ 7). Mr. Dean, President of ICA, also testified that it was company policy for salespersons to make three overnight stays per week. (Dean N.T. at 157-58). Moreover, business records indicate that all other salespersons had substantially more overnight stays than did Brobston. (Def.'s Mot. S.J. Ex. B).

Brobston also contends that, although sales in Territory 60 were negligible, sales in Territory 80 during the time period he was employed were up $100,000 from the previous year due to his efforts. (Brobston Aff. ¶¶ 12-16). Although it concedes

sales in Territory 80 were up from the previous year, ICA attributes the increase to two primary reasons: 1) a technological improvement in the manufacturing process which improved the quality of the product sold and resulted in the return of former lost customers, a fact to which Brobston acknowledged; and 2) an exclusive selling agreement which the President of ICA, Mr. Dean, personally negotiated himself in late 1992. (Dean N.T. at 166-169; Higgins N.T. at 205-07; Brobston N.T. at 129-30; Dean Aff. of Feb. 27, 1993, ¶ 14).

Brobston also acknowledged that, during his employment with ICA, the primary reason for the termination of a salesperson was an inadequate number of sales, and that during his employment he personally was

responsible for terminating employees under forty years of age. (Def.'s Mot. S.J. Ex. 28). The record further demonstrates that Gregory Kester, a thirty year old salesperson, was terminated in March of 1993 due to inadequate performance, which included failure to make the required number of overnight stays per week. (Dean Aff. ¶ 17; see Def.'s Mot. S.J. Ex. B). There is also no evidence in the record that ICA had a history of age discrimination regarding its hiring and firing practices. (See Def.'s Mot. S.J. 4, 28).

Brobston has failed to establish by direct evidence that a discriminatory reason motivated ICA in his termination rather than ICA's proffered legitimate reasons. There is no pattern of discrimination in

ICA's hiring and firing practices, and Brobston has offered no evidence that ICA's termination of him was due to his age. Supra Part A. Furthermore, Brobston has offered no evidence that ICA's reasons for his termination were not credible. There is no doubt that the sales in Territory 60 were negligible. Although sales in Territory 80 were up, Brobston also acknowledged that this was partially due to improvements in the product and not his efforts. Finally, the weight of the evidence indicates Brobston performance was not satisfactory because of his failure to adhere to company policy, including the number of required overnight visits and the filing of weekly expense reports.

Thus, ICA offered numerous legitimate, nondiscriminatory reasons

for Brobston's termination, and Brobston has not offered any evidence indicating that ICA's reasons for terminating him were a pretext. Additionally, Brobston has presented no evidence that ICA's motives in terminating him were attributable to his age. See Retter v. Georgia Gulf Corp., 755 F.Supp. 637, 643 (D.N.J. 1991). Therefore, because Brobston has failed to offer any evidence that age was the determinative factor in ICA's decision to terminate him, summary judgement is appropriate in this case.

/s/ Arnold C. Rapoport
ARNOLD C. RAPOPORT
UNITED STATES MAGISTRATE JUDGE

§ 623. Prohibition of age discrimination

It shall be unlawful for an employer--

"(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * *

(3) to reduce the wage rate of any employee in order to comply with this chapter."